from Inter-City and its subsidiaries as purported salaries or loans (R. 668-669).

These diversions were recorded as Miracle's purchases of automobile finance paper from National. Inter-City would advance funds obtained from investors to Miracle, ostensibly to finance small loans to the public (R. 36-37, 185). Miracle's loans were purportedly made largely to purchasers of automobiles from National, Norman Gradsky's car lot (R. 35-37). Periodically, Norman Gradsky would bring to Inter-City's office a list of "loans" made by Miracle to these alleged purchasers and would receive checks for the amounts of the loans (R. 216, 274-275, 575). From November 1958 to April 1959, Hicks, a National employee, acting under Norman Gradsky's direction, used fictitious names and addresses in executing the loan paper on these purported auto purchases (R. 334-336). He would later endorse on the checks received by National from Inter-City (by way of Miracle) the names of the fictitious borrowers (R. 360). Hicks testified that Norman Gradsky told him that many of the deals were fictitious and that Gradsky was taking them to Inter-City's offices and was "cashing them in" (R. 343-344).

ARGUMENT

1. Contrary to Norman Gradsky's contention (No. 235), the evidence showed a single conspiracy. There was more than adequate evidence for the jury to find one overall conspiracy to obtain money from public investors by misrepresentations and then divert these

funds to petitioners and their colleagues. *Blumenthal* v. *United States*, 332 U.S. 539; *United States* v. *Dardi*, 330 F. 2d 316, 321 (C.A. 2), certiorari denied, 379 U.S. 845; *Sigers* v. *United States*, 321 F. 2d 843, 846-847 (C.A. 5).

National, Norman Gradsky's corporation, was not competing with Inter-City or operating independently of it. Both corporations worked together in a single conspiracy to divert Inter-City funds obtained from investors to Miracle and then to National, from which Norman Gradsky diverted them to himself and his co-conspirators, including Leon Gradsky and others operating out of the Inter-City office. While Leon Gradsky received some money—ostensibly salary and loans—from Inter-City, he also received substantial amounts from National—Norman Gradsky's corporation. This demonstrates that the brothers were engaged in one large scheme which was not severable for purposes of the conspiracy statute.[2]

2. After the jurors retired, they asked for a copy of the indictment. Counsel for both petitioners agreed to supply the indictment after warrants had been removed therefrom, and both counsel then signed the back of the 17th page of the indictment (R. 742-743). They now maintain that it was plain error for the court not to give a supplementary instruction limiting the jury's consideration of the charges to those matters which had been proved by competent

[2] Since there were no multiple conspiracies, there is no substance to Norman Gradsky's corollary contention that the court was guilty of plain error in failing to order a severance.

evidence. But there is no reason to believe that the jury considered as proof any part of the indictment which was unsupported by evidence. The court had previously charged (R. 706): "The indictment itself is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any presumption or permit any inference of guilt." The jury presumably followed this instruction. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

3. In testifying that Leon Gradsky had received substantial sums of money from National, Mr. Callahan, a government accountant, said "* * * I will say that disbursements were made by National either to Leon Gradsky or to Leon Herman which Mr. Norman Gradsky stated in his testimony on June 1, 1961 was his brother Leon Gradsky * * *" (R. 667). It was not plain error for the court to omit an instruction that Norman Gradsky's post-conspiracy declaration was inadmissible as against Leon Gradsky, as petitioner in No. 251 asserts. The testimony came in without objection of any kind. It was a fragment of the overwhelming evidence against Leon Gradsky, whose part in the conspiracy was amply established. And since Leon Gradsky was shown to have received diverted funds under his real name, there was sufficient evidence for his conviction on both the substantive and the conspiracy counts entirely apart from the money he received under the name Leon Herman.

4. Even though Leon Gradsky never requested the court to instruct that guilt must be established in circumstantial evidence cases by proof excluding every reasonable hypothesis of innocence, he now claims that the court's failure to give such an instruction was error. This Court has held, however, that the giving of such an instruction is not required if the charge otherwise properly instructs the jury on the standards of reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 139-140. The court here properly defined reasonable doubt (R. 719-721, 726, 733, 734, 735), and concluded by saying, "Finally, the Government has the burden of proving its case, not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence" (R. 739).

In any event, petitioner's premise that the only evidence against him was circumstantial is not correct. There was direct evidence that he caused the publication of Inter-City's newspaper advertisements, that he made false representations to investors in making sales, that he directed preparation of a false Inter-City financial statement which was shown to investors, and that he received a substantial part of the diverted funds.

5. Hicks, a National employee, testified that under Norman Gradsky's direction he used fictitious names and addresses in executing loan paper on purported auto purchases (R. 334-336). During his direct examination as a government witness the following colloquy occurred (R. 339-340):

Q. Calling your attention to a few days ago, did you have any conversation with Mr. Norman or Leon Gradsky?

A. It wasn't a conversation. I passed by Mr. Leon Gradsky. He says, "Take the Fifth."

Q. Where was this?

A. In the hallway.

Q. In this courthouse?

A. Yes, sir.

Q. Who else was present?

A. Mr. Norman Gradsky.

Q. Did he say anything?

A. He said, "They have 140 deals against you."

There is no merit to Leon Gradsky's contention that this evidence, which came in without any defense objection, was plain error. There is not presented here any question of a post-conspiratorial statement by one conspirator being admitted in evidence against an absent co-conspirator; here both of the Gradskys were present. Leon Gradsky's direction to Hicks to "take the Fifth" could be considered by the jury as an admission by an accused. It was, in effect, an attempt by the accused to suppress testimony which he believed to be harmful and was, therefore, evidence of consciousness of guilt.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JULY 1965